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The Development of the Law of Divorce

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THESIS.

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THE DEVELOPMENT OF THE LAW OF DIVORCE .

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BY

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1894.

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AUTHORITIES CONSULTED.

New Englander, Vol. XXVI.

Kent's Lectures, Vol. XXVIII. Lecture 27.

Bishop on Marriage, Divorce, and Separation, Vol. I-II

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DOCTRINE OF DIVORCE AT THE TIME OF CHRIST.

Since the beginning of time men have sought marriage; and since the beginning of time some men have sought to break up the relation into which they have entered.

As men have attained moral enlightenment they have felt that wrong might cling to the latter procedure, and they have endeavored to find out where the wrong lay, and have tried to develop some rules or modes of action by which they might avoid wrong in breaking up the marriage relation.

Whatever rules or modes of action might be determined upon, of them, of course, fraud and pretense would avail themselves.

But behind the whole body of practice in breaking up marriage, we may conclude that there lay in consciousness a moral question. Had this not been the case no rules would have ever come into existence by which men would be expected to conform their action in breaking up their marriage relation.

When Christ came to deal with the moral affairs of men,

the question, what was right to do in respect to divorce was before the mind of the Jewish people. It had been before the mind of that people for more than a thousand years. It was still a vexing question. The solutions proposed had never been ~~crystallized~~ into a principle that seemed to be a guide to a universal practice. So men were debating the question for what causes a man might put away his wife.

The law of Moses was seen to be primarily merely a regulation of the mode of procedure when a man put away his wife. But for what causes she should put him away, on that there was debate.

This question~~o~~ vexata was brought before Jesus Christ. He took hold of it and gave it a treatment that like the rest of his work in morals, seems to be work done for all time.

The law of Christ as given to the Pharisees was that no man should put away his wife except it be for fornication, Matthew, XIX..

At this time women had very few rights under the Hebrew laws. The woman might have her husband killed for adultery so strict were the customs regarding this crime, but that was

her only remedy. Should she be brutally treated or neglected, there was no law providing for her relief. These laws however, allowed the husband to put his wife away if she was unclean. Here a controversy was raised between the schools of Shammai and Hillel. The latter claiming that the term unclean applied to any offensive act or that it should be used in its ethical sense while the former claimed that it applied to immoral acts as adultery.

A man dismissing his wife was obliged to give her a formal writing showing the reason for sending her away. This is about all the procedure necessary then. This was the state of affairs when Christ spoke on the question. Christ was not a civil legislator, but a supreme moral teacher. He did not establish laws of divorce but rather declared that the existing code permitted many things which violated high ethical rules, and that the freedom then allowed was entirely inconsistent with the true principal conception of marriage. Thereby Christ by a few words on this subject turned legislation and usage into a new channel.

THE DIFFERENT KINDS OF DIVORCE.

Take up a law book and you will find divorce treated under two heads.

1. Divorce a vinculo Matrimonii; or divorce from the bond of marriage; and,
2. Divorce a mensa et thera; or divorce from table and bed; or as we usually say, from bed and board.

The subject of a nullity might well be discussed here, but in this treatise we will be unable to give it proper attention.

These definitions pretty clearly convey an idea of the extent and the limitations of the kind of divorce to which they are severally applied. The briefest expression of the distinction between the two is that of Blackstone, who says, " One is total, the other partial."

Divorce from the bond of matrimony is a total severance of that bond, and usually places both parties, so far as the law is concerned, in the same attitude toward each other, and toward every person else, as though they never had been

married.

This kind of divorce has existed under some form, and with varying regulations, by the authority of the government of almost every nation of mankind. It had its standing in the Jewish law, Greek, and Roman law. It had its standing in the civil law- that is, in that body of secular law which grew up about the later Roman Empire and its successors in Europe. The power to sunder the bond of matrimony for various and varying causes stands in the statute law of many of the modern nations of the continent of Europe. It stands in the statutes of Great Britain, and in the statutes of most, if not all, of the States of the American Union.

Divorce is not known in the common law of this country, Properly speaking it was not known to the common law of England, but only to ecclesiastical law. We shall have occasion further on to discuss the drift of legislation upon divorce from the bonds of matrimony.

Divorce a mensa et thora, is only partial severance of the marriage bond. It separates the parties from each other, so far as to remand each to the liberty of his and her

own personal control unhindered by the other. There is an evident forelooking in such kind of divorce to a reconciliation and reunion of the separate parties. *New Englander*, Vol. XXVI., page 403.

Divorce *a mensa et thora* grew up in the Church,-- the Western Church,-- as its solution of the difficulties of the marriage situation. It had been the practice of the Catholic Church to allow no divorce from the bond of matrimony. It met all the evils of the marriage state by what was meant to be a disciplinary process-- separation from bed and board under such restrictions as its authorities deemed wise to make.

There grew up within the church a code of laws and variety of regulations on many other matters besides that of divorce. This code of laws and body of regulations is known as the canon law.

When nations became Christians many of them recognized this canon law, and turned over to the church courts the subjects which it covered. This was the case in England, where for centuries matters pertaining to divorce went to

ecclesiastical courts, and were administered according to canon law. But until the year 1857, what might be called the common law of England, of divorce was canon law-- the outgrowth of the regulations of the church. Till that year in that country divorces for adultery even could be only from bed and board.

The ecclesiastical courts were not adopted in this country. Divorce has no standing here except by statute. Probably all of the states have now statutes on the subject of divorce. In very many, provisions are made for divorce from bed and board. In some of the states the statutes are so constructed, that it is at the option of a party, for any cause, to bring a bill for divorce, either a vinculo or a mensa.

There is great need of a better understanding of the philosophy and use of divorce a mensa. It has little standing in the law and in the social practice of the people of this nation that many of the States have no statute permitting and regulating it, and some have recently repealed statutes authorizing it.

Certainly it is easy to conceive of a case in which a wife might desire to be freed from the control of a drunken husband. Who yet might ^{be} conscientious or even have sentimental scruples about total disruption of the marriage bond. Such a woman ought not to be, by the statute law of the State, ^{led} up to the alternative of procuring a divorce from the bonds of marriage, or of enduring her miseries without help from society. Even if a large percentage of applications for divorce are for divorce a vinculo, that is no reason why the State should not provide for divorce a mensa for those who desire it. These are most likely to be of conscientious nature. Is the State to adapt its laws to the wishes of the most lawless-- those who will push their advantages under the laws to the greatest extreme?

Canon Todd, in his article in the Contemporary Review, well maintains the ground that the laws ought to correspond to the convictions of the people-- that those who have religious scruples ought not to be compelled to violate those scruples in order to obtain aid from the law.

Take now, for example, any state where there are no

provisions for divorce a mensa. It has many of the Catholic faith among its citizens. The Catholic Church practically, from time immemorial, has allowed to her adherents divorce a mensa, and has resolutely prohibited, and does still prohibit divorce a vinculo. Yet this State provides only for divorce a vinculo by the statutes. Its statute law is a standing insult and practical injury to all citizens of Catholic faith.

Protestantism is working its way into something like unity with the Catholic Church on the indissolubility of the marriage bonds. Any State in compelling all divorces to be a vinculo, is as offensive to the thoughtful and conscientious Protestant as to scrupulous Catholic. When the greater measure of relief offered by the state for the ills of marriage is a violation of the principles of the most religious of its citizens, it certainly ought to allow the less measure which they might desire. To allow divorce a mensa is defensible every way.

The government is in various ways constantly exercising, incidentally the principle of divorce a mensa- sometimes

upon the motion of one of the partners in marriage; sometimes upon its own motion in spite of the protests of both parties.

If a man breaks the peace by committing assault and battery upon another, the State takes him from the bosom of his family and incarcerates him in the common jail. That is a separation from bed and board of the husband and wife.

If a man commit an assault, deadly in its nature, upon the person of his wife, the State may now at her instigation, or against her consent, interfere and break up the control he may have over her person by imprisoning him for a long term of years. In the exercise of this right the state does not interfere with the marriage bond.

Sufficient basis for divorce a mensa may be found in this police power. Society may provide for its own peace, and in doing so it may incorporate into its statutes the principle of divorce a mensa as one means of securing that peace.

It must be admitted that divorce a mensa is not in the standing with the lawyers. You find now and then a

statement of a Court or a judge in some former generation that trails its way without question down through all the law books.

Well toward a hundred years ago Lord Stowell, said that divorce a mensa left the parties " in the undefined and dangerous character of a wife without a husband, and a husband without a wife". In arguments against the principles of divorce a mensa in the law books that is still quoted as supreme wisdom. Now, that a hundred years ago the brutal class in English society, law and high, were sufficiently numerous to create a kind of public sentiment that a woman who was not under the special protection of some man was lawful plunder for whoever could possess himself of her, is not to be denied. It is not to be denied that divorce a mensa to the brutal instinct did reduce a woman to the condition of a candidate for its game. But it is suggested that there is no further necessity of preserving Lord Stowell's remark in modern law treatises.

Bishop, in his treatise on divorce, which is so really valuable as to hold the field against all others, hesitates

not to reveal, even spitefully, his antagonism to the principle of divorce a mensa. He designates it as an "ill-begotten monster made up of pious doctrine and worldly stupidity". With statements cast in that form there is not much chance to argue.

One can only reply that the moral force which lies behind the demand for divorce a mensa is really piety, and that the intellectual conception is founded not on stupidity, but clearness of vision.

DIFFICULTIES IN DIVORCE.

On the subjects for which a divorce can be granted the statutes range from no divorce a vinculo not even in case of adultery, to divorce at the discretion of the court or for genial infelicity. When you attempt to gather up the general drift of legislation you will find it will run something as follows::

Statutory grounds for divorce:

Adultery, Impotency, Imprisonment for crime, desertion, Neglect to make suitable provision, Cruel and inhuman treatment, Habitual drunkenness, Discretion of the Court.

Some of these grounds do not appear in some statutes. In some, other grounds are added. The way of expressing the same cause is quite various. But [^]there are the main items that find their way into the elementary law treatises for comment.

Here we find ourselves in a predicament for when you begin to make a list of causes for divorce, you cannot end. You can think of other causes that are as rational grounds

for divorce as these. Mr. Bishop says that when you go beyond a list of causes something like the above, you come to "ground uncertain, shadowy". Now chronic hatred or jealousy is not "shadowy" matter in marriage. It is easy enough to conceive of a keenness of hate on the part of a husband that would be far more intolerable than a maudlin good nature that might accompany habitual drunkenness. Yet by the statutes of some states a divorce might be procured for the drunkenness, but it would be impossible to obtain a divorce for hate.

One party could be accommodated with a divorce for a less evil; while another would be held fast to a more bitter fate. There is no rational stopping place when you once start. You cannot specify a list of causes but human experience will bring up something outside your list that will appeal for relief to the sense of justice with more power than many a case that will fall within the list. And it will be no out-of-the-way-, unheard-of trouble either, but something that occurs, or may occur, frequently in human life. Marriage is one of the greatest of human institutions. No

other has a broader reach over the scale of human experience. It is hardly possible to do anything like substantial justice to the evils that may occur in married life, by specifying in the rough, half a dozen causes for which a divorce may be allowed, while the gates are shut on all the rest.

It is only coarse, crude work that the statutes are able to do. But the keenest misery may not lie along the rough lines indicated by the statute, as the subtle state of the affections and moods of disposition cannot find statutory expressions.

As the statutes of the numerous states are in such a confused condition, ^{no wonder} the decisions of the courts, which construe these statutes are worse confounded. It is no objection to the wisdom of these courts that decisions have been rendered contradicting each other in all manner of ways. The difficulty is one inherent in the nature of the case. Suppose the business submitted to the court is to define cruelty or drunkenness, or desertion, or any other statutory cause for divorce, to say what degree of them, or either of them, shall constitute ground for divorce, and what shall not. It is to

be seen at once that the court is set to solve a problem with perpetually varying elements.

Take cruelty for instance, Mr. Bishop says, "Of those things in the law which require definitions there is no one more difficult to define than legal cruelty." Generally it may be stated that at one time or another in the attempt to define cruelty every conceivable case has been decided in every conceivable manner. Distinction has been made where there is no difference. It has been decided that to slap a wife's face is not cruelty, and it has been decided that to throw a pail of water on her is. It has been decided that to wring a wife's nose is not cruelty, and it has been decided that to split in her face is.

There is no need of bringing up other examples of the conflict of opinion over other statutory causes of divorce. We can see that the same difficulties must beset the attempt to define what drunkenness is, or desertion.

For the variety of decisions that can be found on this subject, as has been said, much account must be given to the temper of the judge. What is cruelty or drunkenness as

cause for a divorce with one judge would not be with another. Men differ so much in temperment and perception. If then we attempt to specify by statute causes for which divorce a vinculo should be granted, we find that we are all at sea as to the limits within those causes inside which such divorce should be allowed.

We have the double difficulty before us of deciding what are the causes and then of defining limits within those causes.

THE LAW AS IT EXISTS IN THE UNITED STATES .

We propose in the present article to give some account of the state of divorce in our own country. This is indeed a very difficult task in many ways as in this broad field the materials are either too many or too few, or lie outside of our appropriate province.

The law of divorce must be gathered from the statutes of a great many independent law making bodies, which are certainly continually changing their legislation, so that supplement after supplement would have to be consulted to find the latest wisdom of the representatives of the people. Besides this we might look at the procedure of the courts although it belongs chiefly to the lawyers, and is of use to us in our investigation only so far as it affects the facility of obtaining divorce.

The first point to which we call attention, is the divorce laws of the several states of the union. Here to avoid endless repetition we shall endeavor to bring the necessary details under a few heads.

No such details are furnished us except the scanty ones in the notes of Chancellor Kent's 27th.lecture, (Vol II.95-128.)

Mr. Bishop, in his standard work on marriage and divorce (4 Ed. 1864), declines ^Setting out in extenso the statute laws of our several states relating to divorce. Should this be done "says he", a great number of our pages would be occupied with work, while very little benefit indeed would result to the reader. "But ^{is} observable" he continues, "that the statutory law of this country, relating to this subject, seems in general to have been drawn up by men who either did not possess much knowledge of the unwritten law which governs it, or did not regard such unwritten law as worthy to be considered by them in framing the statutes; and who, moreover, gave but little thought to the matter of the practical working of the statutes. The interpretation of these enactments, therefore, becomes a subject of great difficulty.

Coming now to the laws of the several states we shall find that in some of the oldest ones their origin, has had an important influence on legislation down to the present time. The Puritans brought the English law with them, but separated from it in the matter of divorce, by following, as they suppose, the rules of the New Testament. Adultery and desertion

were then the only causes for divorce, and from this beginning their legislation following the analogy between desertion and certain other kindred offenses, degenerated until it lost sight of the New Testament, entirely. Other colonies adhered more nearly to the English law, or, as Maryland, many have been influenced by the Roman Catholic doctrine of marriage and so confined divorce within narrower limits. Louisiana has been subject to varying forces in the transition from a dependency of France and Spain to the complete American character. In the newer states various concurrent influences may have shaped the divorce laws, such as the views of some prominent man among the earlier settlers, and the origin, foreign or domestic, of large classes of their inhabitants. At first divorces were mainly granted by an act of a colonial legislature in accordance with the practice existing in England.

In the laws of Massachusetts published in 1699, the only provision we find in relation to divorce, is that all controversies concerning marriage and divorce shall be heard and determined by the Governor and Council.

Kent states in regard to more recent times, that the constitutions of Georgia, Alabama, Mississippi allowed divorce only by two-thirds vote of each branch of the legislature after trial and verdict of a superior court, or a court of Chancery. But later constitutions have, in all these states, rendered such actions of the law making body unnecessary, if not forbidden its exercise altogether. Kent adds that in Maryland, Virginia, and South Carolina, the legislature and not the courts had power to decree divorce. In Connecticut and New York, where the courts had jurisdiction, it was not exclusive, that the legislature of these states occasionally made use of this power. In 1836, divorce a vinculo were granted by the legislature of Illinois, without any course assigned, and in 1837, by that of Missouri. But the evils and the questionable right of such special legislation have in a great measure put an end to it.

Such legislation is now prohibited by the constitutions of at least thirty or forty of the states, among the rest by that of New York framed in 1846; and almost all the recent constitutions contain similar restrictions.

The States of the Union, if looked at with reference to their divorce laws, may be divided into those which provide both for absolute divorce and for separation from bed and board, and those which know nothing about the last mentioned procedure.

After examining the statutes of the States, you will find that about one-half authorize absolute and qualified divorce. In some States separation from bed and board may be pronounced by decree of a court temporary or perpetual, and may be revoked by a formal decree or judicial act; although it is usually confined to certain crimes, such as cruelty, or drunkenness, or neglect to maintain the wife.

In other States, such as Rhode Island and Kentucky, it can be granted for any crime which is a cause of a divorce a vinculo, if the parties desire it, and the court think fit. It may, also, be followed in some States by divorce a vinculo if the parties are not reconciled within a certain period; as five or ten years.

We now pass to the laws of the great majority of the States, and leading characteristics of which are to grant

divorce, or it may be separation, for a great variety of offences, to take no account of religious considerations, and thus to aim at removing difficulties which arise between parties in marriage.

These laws of the present time furthermore do not fairly represent the original plan of the colonial legislation. The older States in the course of time have fallen far below the strictness of their ancient laws, and the new ones have started from the lower position on a downward path.

It was natural for Maryland at first to be under the influence of the Catholic doctrine, and for Virginia to follow the model of England. The Puritan colonies began their legislation with two causes for divorce, adultery, and desertion, holding that the New Testament recognized both of these as sufficient grounds for divorce. Such was the early legislation, which continued substantially unaltered until after the revolution shook and broke off the old traditions, and a new development of society began.

When now marriage began to be looked upon more and more as a mere contract, when religious and moral considerations

were kept apart from political, when legislation, perhaps in inexperienced hands, set about removing palpable evils without looking at remote consequences, when cities with their vices and their population grew in size and number, when emigration from the eastern States gave up its lands and homes to an inferior class of society, and in the west many of the foreign settlers were trained up under loose laws of divorce--when such causes as these were acting, it is not strange that laxer principles touching the sanctity of marriage crept in and expressed themselves in legislation. But aside from these social causes of change in the laws, some argue that it was a kind of logical necessity for a broader system of divorce.

If desertion was a good ground for divorce it might be asked why should not neglect to provide for a wife be such also, which is a kind of desertion, or imprisonment which is an enforced desertion. There are other actions which lie at the border of these, why should not they be good grounds for divorce if the sufferer desires it. And so, for ought we know by and by, it may be argued that as the essence of the

marriage, considered in its spirit of love, when this ceases, there is no good reason why marriage should not cease at the pleasure of the parties. Thus we come to the Roman method, to the conception of marriage as a mere contract, and to the principle that incompatibility of temper or a new passion may legitimately put an end to what even the Roman lawyers called the *individua vitae consuetudo*.

It would be a dreary and profitless task if we were able to undertake it, to give an abstract of the laws relating to divorce of a large number of the separate states. All that we shall attempt is, to enumerate the principle causes which authorize the dissolution of marriage in most of the states.

1. Adultery. This can be followed by divorce everywhere, and the definition is substantially the same throughout the country.

2. Desertion. This offence is called by several names, as abandonment, however the sense in all the forms of expressions is no doubt the same. The length and kind of desertion is variously defined by the different states.

3. Imprisonment for crime, his absence or forced separation,

caused by the guilt of one of the parties in preventing the fulfillment of conjugal and family duties. For this reason and perhaps on account of disgrace also most of the states regard this for divorce or separation.

4. Neglect to provide for a wife's maintenance or support. This lies between cruelty and desertion. So it is added in a number of statutes as a reason for divorce, or for separation in those codes in which separation is known.

5. In almost all the statutes which we have consulted cruelty under some form of words or other is a cause for either absolute or qualified divorce. Probably there is no code in any state in which this does not appear. It is described in such phrases as intolerable severity, (Vt), extreme cruelty (Me.), intolerable cruelty (Conn.), cruelty and conduct rendering co-habitation unsafe for the wife (N.Y.), .

Has it not we ask in closing been made to appear that the laws of divorce in this country demand thorough examination, and in many states at least, a thorough revision. And are not all rightminded people called upon to unite in a demand that there be some check on so great and threatening an evil as that which we have spoken of in this treatise.